

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMAL KING.

Case No. CV 15-9948 ODW (AFM)

Petitioner,

ORDER TO SHOW CAUSE

V.

STU SHERMAN, Warden,

Respondent.

On December 29, 2015, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254).

In an earlier action, in Case No. CV 15-9514-ODW (AFM), petitioner had filed a “Motion for: Stay & Abeyance.” This action was summarily dismissed on December 18, 2015, because the Motion was unaccompanied by a Petition. Since petitioner has now filed a Petition, the Clerk of the Court has filed the Petition with a new case number.

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless petitioner has exhausted the remedies available in the courts of the State.¹

¹ The habeas statute now explicitly provides that a habeas petition brought by a person in state custody "shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of

1 Exhaustion requires that the prisoner's contentions be fairly presented to the state
 2 courts and be disposed of on the merits by the highest court of the state. *See James*
 3 *v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994); *Carothers v. Rhay*, 594 F.2d 225, 228 (9th
 4 Cir. 1979). Moreover, a claim has not been fairly presented unless the prisoner has
 5 described in the state court proceedings both the operative facts and the federal
 6 legal theory on which his claim is based. *See Duncan v. Henry*, 513 U.S. 364, 365-
 7 66 (1995); *Picard v. Connor*, 404 U.S. 270, 275-78 (1971). As a matter of comity,
 8 a federal court will not entertain a habeas corpus petition unless the petitioner has
 9 exhausted the available state judicial remedies on every ground presented in the
 10 petition. *See Rose v. Lundy*, 455 U.S. 509, 518-22 (1982). Petitioner has the
 11 burden of demonstrating that he has exhausted available state remedies. *See, e.g.*,
 12 *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).

13 Here, it appears from the face of the Petition that petitioner did not exhaust
 14 his state remedies with respect to four of his six grounds for relief. Specifically, it
 15 appears that Grounds Three to Six were raised for the first time in a habeas petition
 16 that currently is pending before the California Supreme Court.

17 Accordingly, petitioner's inclusion of Grounds Three to Six in the Petition
 18 renders the Petition a "mixed petition" containing both exhausted and unexhausted
 19 claims. If it were clear here that petitioner's unexhausted claims were procedurally
 20 barred under state law, then the exhaustion requirement would be satisfied. *See*
 21 *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989); *Johnson v. Zenon*, 88 F.3d 828,
 22 831 (9th Cir. 1996); *Jennison v. Goldsmith*, 940 F.2d 1308, 1312 (9th Cir. 1991).
 23 However, it is not "clear" here that the California Supreme Court would hold that
 24 petitioner's unexhausted claims are procedurally barred under state law, if
 25 petitioner were to raise them in a habeas petition to the California Supreme Court
 26 (which being an original proceeding is not subject to the same timeliness

27 available State corrective process; or (ii) circumstances exist that render such process
 28 ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

1 requirement as a Petition for Review of a Court of Appeal decision). *See, e.g., In re*
 2 *Harris*, 5 Cal. 4th 813, 825 (1993) (granting habeas relief where petitioner claiming
 3 sentencing error, even though the alleged sentencing error could have been raised
 4 on direct appeal); *People v. Sorensen*, 111 Cal. App. 2d 404, 405 (1952) (noting
 5 that claims that fundamental constitutional rights have been violated may be raised
 6 by state habeas petition). The Court therefore concludes that this is not an
 7 appropriate case for invocation of either statutory “exception” to the requirement
 8 that a petitioner’s federal claims must first be fairly presented to and disposed of on
 9 the merits by the state’s highest court. *See* 28 U.S.C. § 2254(b)(1)(B).

10 Under the total exhaustion rule, if even one of the claims being alleged by a
 11 habeas petitioner is unexhausted, the petition must be dismissed. *See Rose*, 455
 12 U.S. at 522; *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille*,
 13 489 U.S. at 349. However, more recently, the Supreme Court held that, in certain
 14 “limited circumstances,” a district court may stay a mixed petition and hold it in
 15 abeyance while the petitioner returns to state court to exhaust his unexhausted
 16 claims. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (holding “stay and
 17 abeyance is only appropriate when the district court determines there was good
 18 cause for the petitioner’s failure to exhaust his claims first in state court”). Under
 19 *Rhines*, the prerequisites for obtaining a stay while the petitioner exhausts his state
 20 remedies are: (a) that the petitioner show good cause for his failure to exhaust his
 21 claims first in state court; (b) that the unexhausted claims not be “plainly meritless”;
 22 and (c) that petitioner not have engaged in “abusive litigation tactics or intentional
 23 delay.” *See id.* at 277-78. Here, although petitioner did file a “Motion for: Stay &
 24 Abeyance” in the previous action, in Case No. CV 15-9514-ODW (AFM),
 25 petitioner did not purport to make all *three* of the requisite showings for stay-and-
 26 abeyance.

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1 IT THEREFORE IS ORDERED that, on or before February 3, 2016,
2 petitioner either file his stay-and-abeyance application (if he believes he can make
3 the requisite showings) or show cause in writing, if any he has, why the Court
4 should not recommend that this action be dismissed without prejudice for failure to
5 exhaust state remedies unless petitioner withdraws his unexhausted claims.

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7 DATED: January 5, 2016

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10 ALEXANDER F. MacKINNON
11 UNITED STATES MAGISTRATE JUDGE
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